PL Narayanan & Anor v PL Subramaniam & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–4 OF 1987
JEFFREY TAN J
31 OCTOBER 1996

Hindu Law and Custom — *Joint family — Property, disposal of by will — Parties have a coparcenary in joint family — Whether Hindu customary law applicable to Hindus domiciled in Malaysia*

The plaintiffs claimed that their father, the manager otherwise known as Karta of a Hindu joint family in which the plaintiffs and the defendants had a coparcenary, could not dispose of the assets of the Hindu joint family by his will deed dated 31 December 1980 or by a coparcener and that the said will was bad in law and of no effect. The defendants, being siblings to the plaintiffs, counterclaimed by submitting that there was no such alleged Hindu joint family. Both parties had agreed that both the claim and the counterclaim must fail if the court should find that Hindu customary law was not applicable to Hindus domiciled in Malaysia. Counsel for the plaintiffs cited two authorities in support of his contention that Hindu customary law was a recognized personal law of Hindus in Malaysia. Counsel also highlighted ss 2, 8 and 72 of the Income Tax Act 1967 to further support his contention. The fundamental issue for determination was whether Hindu customary law was applicable to Hindus domiciled in Malaysia.

Held, dismissing the claim and the counterclaim:

(1) The observation that an emigrant Hindu carries with him his personal law and customs having the force of law was only true of a Hindu who emigrates from 'one part of India to another (part of India)', or of a Hindu migrating to a foreign country. But when he adopts the law of the people amongst whom he has settled, he ceases to carry his original personal law. Prima facie, he then carries the personal law of his adopted domicile. He cannot preserve his original personal law if he has acquired a domicile of choice in the country of his adoption (see p 776E–G); *Dorothy Yee Yeng Nam v Lee Fah Kooi* [1956] MLJ 257 followed.

(2) The Federal Court did not pronounce that the personal law of Hindus in Malaysia shall be Hindu customary law. The authorities merely settled the question whether the assets of a Hindu joint family should be excluded from probate. Its cognizance of a particular Hindu customary practice — Hindu joint family — was not a signal to apply Hindu customary law. Likewise, the mere reference to a Hindu joint family and Karta in ss 2, 8 and 72 of the Income Tax Act 1967, even though cognizance of a particular customary practice, but for income tax purposes only, is not law that the personal law of

A Hindus domiciled in Malaysia shall be Hindu customary law (see p 778A–C); *B v Comptroller of Inland Revenue* [1973] MLJ 123 not followed.

[Bahasa Malaysia summary

B Plaintif-plaintif menuntut bahawa bapa mereka, pengurus yang juga dikenali sebagai Karta sebuah keluarga bersama Hindu yang mana plaintif-plaintif dan defendan-defendan mempunyai suatu hakmilik bersama (coparcenary), tidak boleh melupuskan aset keluarga bersama Hindu menerusi wasiatnya bertarikh C 31 Disember 1980 atau oleh seorang pemilik bersama (coparcener) dan bahawa wasiat tersebut adalah kurang sempurna dari segi undang-undang dan tidak berkesan. Defendan-defendan, adik-beradik plaintif-plaintif, menuntut balas dengan menghujahkan bahawa tidak terdapat keluarga bersama sedemikian sebagaimana yang dikatakan. Kedua-dua pihak telah bersetuju bahawa kedua-D dua tuntutan dan tuntutan balas mesti gagal sekiranya mahkamah mendapati bahawa undang-undang adat Hindu tidak terpakai kepada orang Hindu yang bermastautin di Malaysia. Peguam plaintif menyebut dua kes bagi menyokong penghujahannya bahawa undang-undang adat Hindu adalah undang-undang diri yang diiktirafkan oleh masyarakat Hindu di Malaysia. Peguam juga E menekankan ss 2, 8 dan 72 Akta Cukai Pendapatan 1967 bagi menyokong hujah selanjutnya. Isu asasi untuk penentuan adalah sama ada undang-undang adat Hindu terpakai kepada orang Hindu yang bermastautin di Malaysia.

F **Diputuskan,** menolak tuntutan dan tuntutan balas:

(1) Pemerhatian bahawa seorang Hindu yang berhijrah membawa bersamanya undang-undang diri dan adat-adat yang berkuatkuasa hanyalah benar mengenai seorang Hindu yang berhijrah daripada 'sebahagian negeri India ke bahagian yang lain (yang masih merupakan sebahagian negeri India)' (one part of G India to another (part of India)), atau seorang Hindu yang berhijrah ke negara asing. Akan tetapi apabila ia menerimapakai undang-undang orang di kalangan yang mana ia telah menetap, ia tidak lagi membawa undang-undang dirinya yang asal. Prima facie, ia kemudiannya membawa undang-undang diri domisil adopsi. Ia tidak boleh mengekalkan undang-undang dirinya yang H asal sekiranya ia telah memperolehi domisil pilihannya di negara adopsi (lihat ms 776E–G); *Dorothy Yee Yeng Nam v Lee Fah Kooi* [1956] MLJ 257 diikut.

(2) Mahkamah Persekutuan tidak mengisytiharkan bahawa undang-undang diri orang Hindu di Malaysia haruslah merupakan I undang-undang adat Hindu. Autoriti cuma menyelesaikan persoalan sama ada aset sebuah keluarga bersama Hindu haruslah dikecualikan daripada probet. Pengambilan tahu tentang suatu

amalan adat Hindu yang tertentu — keluarga bersama Hindu — bukanlah petanda untuk memakai undang-undang adat Hindu. Begitu juga, rujukan semata-mata kepada keluarga bersama Hindu dan Karta dalam ss 2, 8 dan 72 Akta Cukai Pendapatan 1967, meskipun mengambil tahu tentang amalan adat yang tertentu, kecuali untuk tujuan cukai pendapatan sahaja, bukanlah undang-undang bahawa undang-undang diri orang Hindu yang bermastautin di Malaysia haruslah merupakan undang-undang adat Hindu (lihat ms 778A–C); *B v Comptroller of Inland Revenue* [1973] MLJ 123 tidak diikut.]

Notes

For cases on property of Hindu joint family disposed of by will, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2271–2273.

Cases referred to

B v Comptroller of Inland Revenue [1973] MLJ 123 (not folld)
B v Comptroller of Inland Revenue [1974] MLJ 110 (refd)
Bagher Singh v Chanan Singh [1961] MLJ 328 (refd)
Choo Eng Choon, decd, Re (1911) 12 SSLR 120
Dorothy Yee Yeng Nam v Lee Fah Kooi [1956] MLJ 257 (folld)
GW Warren v Tay Say Geok & Ors [1965] MLJ 44 (refd)
Hurbajan Singh v PP [1952] MLJ 83 (refd)
Indyka v Indyka [1969] 1 AC 33 (refd)
Letchumanan Chettiar v Palaniappan [1977] 2 MLJ 258 (refd)
Letchumanan Chettiar v Palaniappan [1978] 1 MLJ 120 (refd)
Tan Toh Sim, decd, Re [1951] MLJ 21 (refd)

Legislation referred to

Civil Law Act 1956 s 3
Civil Law Ordinance 1956 s 3(1)
Income Tax Act 1967 ss 2, 8, 72
Law Reform (Marriage and Divorce) Act 1976

PS Sebastian (*PS Sebastian & Co*) for the plaintiffs.
M Murugappan (*Syarikat KRP Perumal*) for the defendants.

Cur Adv Vult

Jeffrey Tan J: In this action, inter alia, it is the plaintiffs' claim that their father, as the manager, otherwise known as Karta of a Hindu joint family, in which the plaintiffs and defendants (the plaintiffs and defendants are siblings) have a coparcenary that their father could not dispose of the assets of the Hindu joint family by his will dated 31 December 1980 or by a coparcener, and that their father's will dated 31 December 1980 is bad in law and of no effect, whilst it is the defence that there was no such alleged Hindu joint family.

When this action was first called up for trial, the court enjoined both counsel to submit on the applicability of Hindu customary law as a preliminary point of law. However, when this action was called this day, both counsel intimated that the applicability of Hindu customary law to Hindus domiciled in Malaysia would be taken up by both parties as a preliminary issue and that both parties have agreed that both the claim and the counter-claim must fail if the court should find against the applicability of Hindu customary law.

Mr Sebastian for the plaintiffs submitted two authorities which he said recognize Hindu customary law as the personal law of Hindus in Malaysia. He drew the court's attention to ss 2, 8 and 72 of the Income Tax Act 1967 which he said refer to a Hindu joint family and the Karta of a Hindu joint family. On the foundation of those two authorities and the said provisions from the Income Tax Act 1967, Mr Sebastian contended that Hindu customary law is the personal law of the parties in this case. Accordingly, he contended that the wills of the parties' father and mother are invalid as the assets disposed by those testamentary deeds are assets of a Hindu joint family. However, he was not able to furnish any other authority espousing his proposition that Hindu customary law is the personal law of Hindus in Malaysia.

Lest any definition is necessary, 'personal law is the law that governs a given person in family matters, usually, regardless of where the person goes' (*A Dictionary of Modern Legal Usage* (2nd Ed) by Bryan A Garner at p 635).

In the case of the early Indian and Chinese settlors, in the nature of immigrants, they brought their personal customs and practices. Lacking formal institutions, they resolved disputes through mediation by elders of the community, clans or guilds. However, with the introduction of English common law, 'a dual system of law evolved administering both English law and the native or customary law' (*Probate and Administration in Singapore and Malaysia; Law and Practice* by G Raman at p 4). The Court of Judicature for Penang, Malacca and Singapore established by 'Letters Patent' from the British crown and known as the Second Charter of Justice 1826 had the jurisdiction and authority of the English Courts of King's Bench, Chancery, Common Pleas and Exchequer 'in all civil and criminal actions and suits, and in matters concerning the revenue, and in control of the interior Courts of Jurisdiction as far as the circumstances will admit' and the jurisdiction of the English Ecclesiastical Court 'so far as the several religions, manners and customs of the inhabitants ... will admit'. However, with the growth of written law in the Straits settlements and Malay states, personal customs and practices which once leavened the law were gradually subsumed under various enactments and statutes. Polygamous marriages hitherto permitted to certain sections of the community, for example, was 'phased out' by the Law Reform (Marriage & Divorce) Act 1976. Presently, there are written laws relating to wills, succession, marriages and guardianship. Indeed, it can be said that personal law is now fully regulated by written law. As it is, without written law, personal customs and practices lack the force of law.

As said, personal law is the law that a person carries with him. 'This means that the actions of a person would be determined by the legal system to which he belongs. A person may enter into marriage, draft his own will or die intestate leaving the question of succession entirely to that system of law' (*Probate and Administration in Singapore and Malaysia: Law and Practice* by G Raman at p 38). 'In common law systems, personal law refers to the law of the individual's domicile (lex domicilii)' (*A Dictionary of Modern Legal Usage* (2nd Ed) by Bryan A Garner at p 655). Thus, 'subject to certain exceptions, the succession to the movables of a deceased person is governed by the law of his domicile at the date of his death ... and the succession to his immovables is governed by the lex situs, that is the law of the place where the immovable is situated. The English court generally applies the doctrine of total renvoi to question of succession. Thus in arriving at a decision, it considers itself to be a court sitting in the country where the deceased was domiciled at the date of his death or the property is situated, as the case may be, and it decides the question as such a court would have decided it' (*Halsbury's Laws of England* (4th Ed) Vol 8 paras 676–677). A person may have a multiplicity of nationalities, but he can only possess one domicile (*Indyka v Indyka* [1969] 1 AC 33 at p 103, per Lord Wilberforce). Domicile can be changed, but with a change of domicile, by choice or dependence, there is a change of the personal law. 'The general principle of private international law ... is that a person's personal law depends on his domicile, that is to say, it is the law of the civil society to which he belongs for the time being' (*Dorothy Yee Yeng Nam v Lee Fah Kooi* [1956] MLJ 257 at p 263, per Thompson J (as he then was)). It should be settled, therefore, that the personal law of Hindus domiciled in Malaysia, because their domicile is Malaysia, will be governed by the laws of Malaysia.

Yet surprisingly, Michael F Rutter remarked in his book entitled *The Applicable Law in Malaysia and Singapore* at p 442 that: 'Hindu customary laws in personal law matters might continue to govern Hindus, even when they are domiciled in Malaysia'. The learned author alluded to the following observation of the learned judge in *B v Comptroller-General of Inland Revenue* [1973] MLJ 123 at p 127:

> On this it was contended that the personal law applicable to the appellants was the law of this country and under this law, the joint family system as understood in India was not part of the law except in those cases where persons domiciled in India have some property in this country forming part of the Hindu Joint Family property. ...
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> For myself, I am prepared to accept the contention that a man's personal law is the law of the forum in which he lives, but with respect, to say that the law of Malaysia excludes the personal law of the individual is, I may put it, and with respect, to ignore the proviso to s 3(i) of the Civil Law Ordinance No 5 of 1956 (the law then in force), which gives effect to 'the circumstances of the states comprised in the Federation and their respective inhabitants permit and subject to such qualification as local conditions render necessary', and to the several decisions not only of the High Courts but of higher tiers of this country as well as of India on the question whether an emigrant Hindu carries with him his personal law and custom having the force of law.

A As to this, it is set out in the preliminary note at p 787 of *Mallal's Digest of Malaysian and Singapore Case Law* (3rd Ed) that the law is settled beyond doubt that where a Hindu emigrates from one part of India to another, the presumption is that it carries with it its personal law, that is, the laws and customs as to succession and family and that such personal law is part of the status of every family which is governed by it. This presumption is rebuttable. B It is also settled law, settled by no less an authority than the Privy Council, that a Hindu migrating to a foreign country carries with him his personal law, unless he establishes that he has adopted the law of the people among whom he has settled. ...

On the law as settled I must therefore hold that where a Hindu shows the deliberate preservation of his personal law, as here in the matter of joint C families, he is bound by such personal law, despite the fact that he has now emigrated to another country and has acquired a domicile of choice in the country of his adoption.

However, that observation, with utmost respect to the eminent judge whose erudite judgments normally settled authoritatively even the most difficult points of law, is highly debatable. D

The learned judge accepted the contention that 'a man's personal law is the law of the forum in which he lives'. Then, clearly it was agreed that the personal law of Hindus domiciled in Malaysia shall be the law of Malaysia. As said, a man can have only one domicile and ipso facto one personal law. Accordingly, the personal law of Hindus domiciled in E Malaysia shall be governed by the law of Malaysia. It goes without saying that the personal law of Hindus domiciled in India must be excluded. Otherwise, Hindus domiciled in Malaysia will have two sets of personal law. Then, it could not be true 'that where a Hindu shows the deliberate preservation of his personal law ... he is bound by such personal law, despite the fact that he has now emigrated to another country and has acquired a F domicile of choice in the country of his adoption,' as that would be giving two sets of personal law to Hindus domiciled in Malaysia.

It was also not true that the exclusion of the personal law of Hindus domiciled in India would ignore the proviso to s 3(1) of the Civil Law Ordinance 1956.

G Section 3(1) of the Civil Law Ordinance (since repealed by the Civil Law Act 1956) reads as follows:

> Save in so far as other provision have been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance:
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> H Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

Unquestionably, s 3 of the Civil Law Ordinance was only concerned with I the application of the common law of England and rules of equity provided that (the proviso) the said 'common law and rules of equity shall be applied so far only as the circumstances of the states and settlements and their

respective inhabitants permit and subject to such qualifications as local circumstances render necessary', if there was a lacuna in the law (*Bagher Singh v Chanan Singh* [1961] MLJ 328) and if there was no other written law in force (*HG Warren v Tay Say Geok & Ors* [1965] MLJ 44). Under the Civil Law Act 1956, in West Malaysia, the common law of England and the rules of equity and certain statutes as administered in England on 7 April 1956 'shall be applied so far only as the circumstances of the States of Malaya and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary' (s 3 Civil Law Act 1956). Thus, under ordinance or act, there is no question of Malaysian law deigning to English law. A court shall administer the common law of England and the rules of equity so far only as Malaysian circumstances and Malaysians permit.

However, unlike the case of English common law, there was no similar s 3 provision for the application of Hindu customary law. Clearly, the court had no jurisdiction to apply Hindu customary law, other than under the renvoi doctrine. But even if there was jurisdiction, if there was a provision similar to s 3 of the Civil Law Ordinance or Act, mutadis mutandis, the court could only apply Hindu customary law so far only as the circumstances of the States of Malaya and their respective inhabitants permitted and subject to such qualifications as local circumstances rendered necessary. It could not be, as apparently was the case in *B v Comptroller-General of Inland Revenue* [1973] MLJ 123, that the court shall apply Malaysian law so far as the circumstances of Hindu customary law permitted.

As for the decisions of the High Court and higher tiers of this country as well as India to have supposedly settled beyond doubt that an emigrant Hindu carries with him his personal law and customs having the force of law, with respect, that observation is only true of a Hindu who emigrates from 'one part of India to another (part of India)'. That observation is also true of a Hindu migrating to a foreign country. But when he adopts the law of the people amongst whom he has settled, he ceases to carry his original personal law. Prima facie, he then carries the personal law of his adopted domicile. He cannot preserve his original personal law if he has acquired a domicile of choice in the country of his adoption.

Furthermore, again with respect, the court failed to recognize that the past decisions of the local courts were made when 'the law relating to persons in this country deals with different communities in much the same way as the law of England deals with persons domiciled outside England; questions of divorce, guardianship and the like, are decided according to the law or custom of the community to which the parties belong' (*Hurbajan Singh v PP* [1952] MLJ 83, per Taylor J) when there was an absence of statutory provisions (*Re Tan Toh Sim, decd* [1951] MLJ 21 at p 26) and when personal law was based even on race (*Re Choo Eng Choon, decd* (1911) 12 SSLR 120).

Unfortunately, *B v Comptroller-General of Inland Revenue* [1973] 1 MLJ 123 was not considered, primarily, from the standpoint of domicile

A that was 'firmly established in this country'. At any rate, on appeal, in *B v Comptroller-General of Inland Revenue* [1974] 2 MLJ 110, the Federal Court adopted the observation of the High Court that a Hindu who shows the deliberate preservation of his personal law is bound by such personal law despite the fact that he has acquired a domicile of choice in the country of his adoption. Since it is settled law that personal law shall be governed by
B the law of the domicile, it could only be assumed that the Federal Court had adopted the observation of the High Court within the limited and narrow context of the assessment of income tax on the basis of the Hindu joint family but not as its endorsement that Hindus domiciled in Malaysia are governed by their original personal and customary laws.

C Turning now to one of the two authorities that Mr Sebastian cited, in *Letchumanan Chettiar v Palaniappan Chettiar* [1977] 2 MLJ 258, a case where the deceased died intestate leaving all his estate and effects in India, Burma, Malaysia, Singapore, or elsewhere including movable and immovable assets belonging to him and to the Hindu joint family firm of PL AR at Port Dickson ..., where the plaintiff as sole named executor
D claimed for the grant of probate, whilst the defendant claimed that the joint family property could not be willed away by the deceased, the learned judge held that Hindus domiciled in Malaysia must continue to be governed by their original personal and customary laws unaffected by any legislative changes to those laws which may be made from time to time in India. Holding the parties to be governed by Mitakshara law under which a
E coparcener cannot dispose of by will his undivided coparcenary interest, except where he is the sole surviving coparcener, and on that finding the learned judge had the agreement of the parties to abide by the finding of the Indian courts which in the event the Indian Supreme Court declared that PL AR and its assets belonged to the Hindu joint family, the learned judge
F held that the assets of the Hindu joint family shall form part of the estate of the deceased as on an intestacy. Quite obviously, the learned judge held that the personal law of Hindus in Malaysia shall be Hindu customary law.

However, on appeal (*Letchumanan Chettiar v Palaniappan Chettiar* [1978] 1 MLJ 120 — the other authority that Mr Sebastian cited) the Federal Court held, reversing the order of the trial judge and substituting in
G its place an order granting probate of the deceased's will to the plaintiff/appellant, that a court when dealing with a suit for probate of a will cannot go into the question of title to property in such a suit. A probate court, the Federal Court enunciated, is only concerned with the question of the genuineness of the will, its due execution and attestation and testamentary
H capacity of the testator and that it is not part of the jurisdiction of the probate court to pronounce on the validity of the bequest. Surprisingly, whereas it dwelled at length on the subject of Hindu joint family, the Federal Court passed over for comment the striking pronouncement by the trial judge that Hindus domiciled in Malaysia must continue to be governed by their original personal and customary laws.

I Nonetheless, it is still unmistakable that *Letchumanan Chettiar v Palaniappan Chettiar*, at first instance or appeal, is not binding authority that the personal law of Hindus in Malaysia shall be Hindu customary law, as

Mitakshara law and the Hindu joint family were findings of a foreign jurisdiction whilst the local courts merely adopted those findings with the agreement of the parties as facts when determining the refusal of probate. *Letchumanan Chettiar v Palaniappan Chettiar* merely settled the question whether the assets of that Hindu joint family should be excluded from probate. The Federal Court did not pronounce that the personal law of Hindus in Malaysia shall be Hindu customary law. Its cognizance of a particular Hindu customary practice — Hindu joint family — was not a signal to apply Hindu customary law. Likewise, the mere reference to a Hindu joint family and Karta in ss 2, 8 and 72 of the Income Tax Act 1967, even though cognizance of a particular customary practice but for income tax purposes only, is not law that the personal law of Hindus domiciled in Malaysia shall be Hindu customary law.

It remains, and so it is the finding of this court, that the personal law of Hindus domiciled in Malaysia shall be governed by the laws of Malaysia, the lex domicilii; Hindu customary law has no force of law. Since it has been agreed between the parties that both the claim and counter-claim must fall if Hindu customary law does not govern Hindus domiciled in Malaysia, it must follow that the claim and counterclaim be dismissed, and so it is with costs.

Claim and counterclaim dismissed.

Reported by Mohd Rizal Abidin